No. 02-858

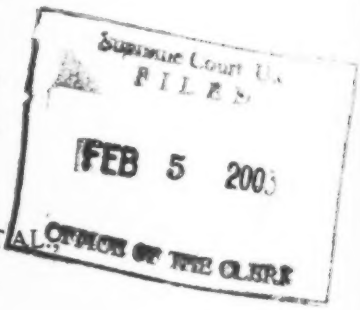
IN THE

Supreme Court of the United States

WORLDCOM, INC., AT&T CORP., AND COVAD COMMUNICATIONS COMPANY,
Petitioners,

v.

UNITED STATES TELECOM ASSOCIATION, ET AL.,
Respondents.



On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

In *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), this Court held that 47 U.S.C. § 251(d)(2) prevents the Federal Communications Commission ("FCC") from imposing on incumbent local exchange carriers a "blanket" duty to unbundle their "network elements." In a 1999 order on remand from this Court's decision, the FCC nevertheless reinstated, with only minor alterations, the same blanket unbundling rules that this Court had vacated. In a companion order, the FCC even expanded its list of unbundled network elements to include facilities used exclusively in the highly competitive "broadband" — or high-speed data — market. The FCC subsequently began a new proceeding to reconsider these broad unbundling requirements; it expects to conclude that proceeding by the end of February 2003, when it will adopt a new order that will supersede the FCC orders at issue here.

The question presented is whether the D.C. Circuit, in invalidating the FCC's 1999 blanket-access rules and remanding the matter to the FCC to allow the agency to determine an appropriate set of unbundled elements, properly applied section 251(d)(2), as already interpreted by this Court.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents BellSouth Corporation, SBC Communications Inc., Qwest Communications International Inc., the Verizon telephone companies,* and the United States Telecom Association state the following:

BellSouth Corporation has no parent company, and no publicly owned company owns 10% or more of its stock.

Qwest Communications International Inc. has no parent company. FMR Corporation owns 10% or more of its stock, and AXA Financial, Inc. owns nearly 10% of its stock.

SBC Communications Inc. has no parent company, and no publicly owned company owns 10% or more of its stock.

The Verizon telephone companies are wholly owned subsidiaries of Verizon Communications Inc. Verizon Communications Inc. has no parent company, and no publicly owned company owns 10% or more of its stock.

The United States Telecom Association ("USTA") is the leading not-for-profit trade association for the local telephone industry. Founded more than a century ago, USTA represents some 600 facilities-based incumbent wireline providers of local telephone service, which operate more than 80% of the country's local access lines. USTA also has international and associate members that include consultants, communica-

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* The Verizon telephone companies (formerly the affiliated local telephone companies of Bell Atlantic Corporation and GTE Corporation) consist of the following: Contel of Minnesota, Inc. d/b/a Verizon Minnesota, Contel of the South, Inc. d/b/a Verizon South Systems, GTE Alaska Incorporated d/b/a Verizon Alaska, GTE Arkansas Incorporated d/b/a Verizon Arkansas, GTE Midwest Incorporated d/b/a Verizon Midwest, GTE Southwest Incorporated d/b/a Verizon Southwest, The Micronesian Telecommunications Corporation, Verizon California Inc., Verizon Delaware Inc., Verizon Florida Inc., Verizon Hawaii Inc., Verizon Maryland Inc., Verizon New England Inc., Verizon New Jersey Inc., Verizon New York Inc., Verizon North Inc., Verizon Northwest Inc., Verizon Pennsylvania Inc., Verizon South Inc., Verizon Virginia Inc., Verizon Washington, DC Inc., Verizon West Coast Inc., Verizon West Virginia Inc.

tions equipment providers, banks and investors, and other parties with interests in the local exchange carrier industry. USTA has no parent companies, subsidiaries, or affiliates for which disclosure is required.

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PRELIMINARY STATEMENT

This case presents no issue of continuing importance meriting plenary review. Accordingly, the petition for certiorari should be denied.

First, the Federal Communications Commission ("FCC" or "Commission") recently confirmed in a court filing that the orders at issue here will be superseded by a new FCC decision that will be adopted no later than February 20, 2003, that comprehensively revisits the agency's unbundling rules. There is no reason for the Court to address the merits of rules that will be supplanted in a matter of weeks.

Second, even before the D.C. Circuit issued its decision, the FCC independently decided that, as part of its ongoing review of unbundling requirements, it intended to address many of the same pivotal issues that the court of appeals subsequently directed the agency to consider on remand. For that reason, the head of a trade association representing the interests of these petitioners has declared that this D.C. Circuit decision is "simply a sideshow," and that the "real battle" is taking place in the now-soon-to-be-completed FCC proceedings, where the agency is "consider[ing] the same issues and more."[1]

Third, the FCC and the United States have determined that this case did not merit filing their own petition for certiorari. Even petitioner AT&T has argued that plenary review is unwarranted in such circumstances: "If the expert agency charged with administering [a particular regulatory issue] has determined that the court of appeals' decision does not undermine its programmatic objectives to such an extent as to warrant further review, then there is no cause for this Court to conclude otherwise."[2] That is precisely right, and it

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[1] Statement by H. Russell Frisby, Jr., *D.C. Circuit Decision Is Simply a Sideshow, Real Battle Is Being Fought at FCC*, CompTel Press Release (May 24, 2002), *at* http://www.comptel.org/newsfr.html.

[2] Brief in Opposition for Time Warner Entertainment Co. and AT&T Corp. at 12, *Consumer Fed'n of Am. v. FCC*, No. 01-223 (U.S. filed Nov. 2, 2001).

accords with this Court's consistent practice under the Communications Act of 1934 and elsewhere.

Fourth, the D.C. Circuit's unanimous decision (Williams, J., joined by Edwards and Randolph, JJ.) properly applied this Court's pre-existing interpretation of the relevant provision of the Telecommunications Act of 1996 ("1996 Act" or "Act"). In *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), seven Justices agreed that 47 U.S.C. § 251(d)(2) precluded the FCC from mandating "blanket access" to network elements. *Id.* at 390. The Court accordingly vacated the FCC's 1996 unbundling rules *in toto*. In this case, the D.C. Circuit concluded that a list of unbundled network elements that was "virtual[ly] ident[ical]" to (Pet. App. 21a) — indeed, in key respects, more expansive than — the list this Court struck down was likewise inconsistent with the statute.

The court of appeals' decision, like this Court's prior ruling, is grounded in the principle that the statute's unbundling duty is not "unrestricted," but rather requires application of a meaningful limiting standard. *Iowa Utils. Bd.*, 525 U.S. at 390; Pet. App. 17a-18a. On remand from this Court's decision, the FCC again failed to adhere to that critical statutory limitation on incumbents' unbundling duties. The court of appeals' decision simply reaffirms this Court's pre-existing teachings on this vital point.

Fifth, *Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646 (2002), confirms that the D.C. Circuit's decision is correct. *Verizon* makes plain that unbundling should be limited to true "bottleneck" facilities to encourage facilities-based competition in other facilities that competitors could provide themselves. As the *Verizon* Court explained, "entrants may need to share some facilities that are very expensive to duplicate . . . in order to be able to compete in other, more sensibly duplicable elements." *Id.* at 1672 n.27. That understanding is wholly consonant with the D.C. Circuit's judgment here. Beyond this crucial recognition of the need to limit unbundling, *Verizon* is not pertinent here, because it involved the *pricing* of whatever network elements must be unbundled,

not the antecedent question of which elements qualify for unbundling.

STATEMENT OF THE CASE

1. The 1996 Act. For most of the last century, local telephone service was thought to be a natural monopoly. States therefore granted an exclusive franchise in each local telephone service area and regulated incumbent local exchange carriers ("ILECs") as public utilities. States required ILECs to provide "universal" service (that is, service at affordable rates to all who desire it) and closely regulated ILECs' rates. In exchange, the states assured ILECs (through rate-setting proceedings) an opportunity to recover and earn a fair return on their prudently invested capital.

The 1996 Act seeks to transform this model of local telecommunications. Congress expressly concluded that "meaningful facilities-based competition is possible" in local telecommunications. S. Conf. Rep. No. 104-230, at 148 (1996). It therefore set out a "pro-competitive, de-regulatory" framework for introducing full facilities-based competition by "accelerat[ing] rapidly private sector deployment of advanced telecommunications and information technologies and services." *Id.* at 113. As the FCC has explained, this "fundamental goal of the Act" was based on Congress's recognition that "only facilities-based competition" would "fully unleash" providers' "abilities and incentives to innovate, both technologically and in service development, packaging, and pricing."[3]

Congress understood, however, that, in the short term, it is unlikely that competing providers — often called "competitive local exchange carriers" or "CLECs" — could duplicate every aspect of a local telephone network. Congress thus recognized that competitors, at least initially, may need to

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[3] *UNE Remand Order* ¶ 110 (Pet. App. 116a); Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, *Promotion of Competitive Networks in Local Telecommunications Markets*, 14 FCC Rcd 12673, 12676-77, ¶ 4 (1999).

obtain "*[s]ome* facilities and capabilities" from the ILEC. S. Conf. Rep. No. 104-230, at 148 (emphasis added). As this Court explained in *Verizon*, access to some difficult-to-duplicate elements may be necessary to allow facilities-based competition. *See* 122 S. Ct. at 1672 n.27 ("competition as to 'unshared' elements may, in many cases, only be possible if incumbents simultaneously share with entrants some costly-to-duplicate elements").

Accordingly, Congress not only preempted all state exclusive-franchise laws, *see* 47 U.S.C. § 253(a); it also required ILECs to permit CLECs to lease individual piece-parts of their networks, known as "unbundled network elements" or "UNEs,"[4] so that CLECs could use these discrete network components together with their own facilities to provide telecommunications services. *See id.* § 251(c)(3).

Importantly, however, to ensure that competitors obtained access only to true bottleneck facilities and provided their own facilities where that was sensible, Congress permitted the FCC to require unbundling of network elements only in limited circumstances. Section 251(d)(2) provides that, "[i]n determining what network elements should be made available for purposes of" section 251(c)(3), "the Commission shall consider, at a minimum, whether —

> (A) access to such network elements as are proprietary in nature is necessary; and
>
> (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."

Id. § 251(d)(2).[5]

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[4] A "network element" is "a facility or equipment used in the provision of a telecommunications service," including "features, functions, and capabilities that are provided by means of such facility or equipment." 47 U.S.C. § 153(29).

[5] In addition to its unbundling mandate, Congress also required ILECs to make available to CLECs every service that they sell at retail to end users (such as basic local telephone service for residential subscribers) so

2. The 1996 *Local Competition Order*. In its initial order implementing the 1996 Act,[6] the FCC concluded that the "necessary" and "impair" standards that Congress imposed to limit access to network elements in fact placed no limitation on ILECs' duty to unbundle. Rather, the FCC read the statute to impose an unlimited requirement that ILECs unbundle any network element that it is technically feasible to provide. *See Local Competition Order*, 11 FCC Rcd at 15640, ¶ 278. The result was that ILECs were required to unbundle *all* the facilities that are used to provide local service.[7] The FCC further required incumbents to offer a pre-combined set of all the UNEs necessary to provide local telephone service (often referred to as a "UNE Platform" or "UNE-P") at cost-based UNE rates, not the retail-price-based rates that Congress provided for access to complete services for resale. *See* 47 U.S.C. § 252(d)(1), (3); *see also supra* note 5 (discussing resale rates).

3. This Court's *Iowa Utilities Board* Decision. This Court vacated the FCC's expansive rules, holding that the Commission had failed to honor the restrictions set forth in

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that CLECs may resell those services to their own customers. *See* 47 U.S.C. § 251(c)(4). To distinguish the gap-filling function of network elements from access to complete services for resale, Congress created different pricing rules for each. Prices for access to network elements "shall be . . . based on the cost . . . of providing the . . . network element" and "may include a reasonable profit." *Id.* § 252(d)(1)(A)(i). Access to complete ILEC retail services for resale, by contrast, is based on current retail prices less costs "that will be avoided by the [ILEC]" when it provides services at wholesale. *See id.* § 252(d)(3).

[6] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*") (subsequent history omitted).

[7] In particular, the FCC required access to the local loop, the network interface device, switching capability (which involves the use of computers to route calls on the network), interoffice transmission facilities, signaling networks and call-related databases, operations support systems functions, and operator services and directory assistance. *See* 47 C.F.R. § 51.319 (1997) (listing and defining these elements).

section 251(d)(2). In an opinion joined by seven Justices, the Court stated: "[I]f Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included § 251(d)(2) in the statute at all. It would simply have said (as the Commission in effect has) that whatever requested element can be provided must be provided." *Iowa Utils. Bd.*, 525 U.S. at 390.

The Court specifically rejected two critical components of the FCC's analysis. First, the Court held that the Commission had improperly refused to consider whether competitors could engage in facilities-based competition by deploying or obtaining facilities from sources other than the incumbent: "The Commission cannot, consistent with the statute, blind itself to the availability of elements *outside* the incumbent's network." *Id.* at 389 (emphasis added).

Second, the Court held that "the Commission's assumption that *any* increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element 'necessary,' and causes the failure to provide that element to 'impair' the entrant's ability to furnish its desired services, is simply not in accord with the ordinary and fair meaning of those terms." *Id.* at 389-90. The Court emphasized that a consideration of "costs" alone was inappropriate when the evidence demonstrated that a CLEC could reasonably provide service using alternative facilities. *Id.* at 390 & n.11.

The Court thus vacated all the FCC's unbundling rules and made clear that, on remand, the Commission must "apply *some* limiting standard, rationally related to the goals of the Act." *Id.* at 388. The Court also indicated that incumbents' concerns regarding access to a complete set of all the pre-assembled facilities necessary to provide service at cost-based UNE rates could well be rendered "largely academic" by application of an appropriate unbundling test. *Id.* at 392.

In a separate opinion concurring in relevant part, Justice Breyer explained that "[i]ncreased sharing by itself does not automatically mean increased competition." *Id.* at 429. Sharing of bottleneck facilities was thus valuable to the

extent that it enabled competitors to compete by providing other facilities themselves: "It is in the *un*shared, not in the shared, portions of the enterprise that meaningful competition would likely emerge. Rules that force firms to share *every* resource or element of a business would not create competition, but pervasive regulation, for the regulators, not the marketplace, would set the relevant terms." *Id.*

4. The FCC Proceedings on Remand. On remand from this Court's decision, ILECs presented comprehensive data demonstrating that, for many of the elements to which the FCC had previously mandated access, competitors could deploy, and in fact were deploying, their own facilities. ILECs showed, for example, that more than 60 CLECs had deployed interoffice transport facilities in 289 cities, including every one of the nation's top 50 markets, and nearly all of the next 100 markets as well.[8] Facilities-based CLECs also demonstrated that deployment was occurring in many areas and urged the Commission to "set real limits on the availability of UNEs from ILECs" so as not to undermine their own efforts to compete using their own facilities.[9]

After receiving these and other comments, the Commission issued a new decision. The FCC purported to create the meaningful limiting standard on unbundling that *Iowa Utilities Board* required by adding the word "materially" to its previous definition of "impair." The Commission now "conclude[d] that the failure to provide access to a network element would 'impair' the ability of a requesting carrier to provide the services it seeks to offer if . . . lack of access to that element materially diminishes a requesting carrier's ability to

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[8] The evidence also showed that 150 CLECs had deployed 724 switches in 320 cities, and that CLECs were already using their own loops to serve 8%-18% of large business customers in high-density areas. Peter W. Huber & Evan T. Leo, *UNE Fact Report* at I-1 to I-2, II-6, II-4 to II-5, III-16 to III-17 (1999) (C.A. App. 293-94, 333, 331-32, 365-66) (attached to Comments of the United States Telecom Association, CC Docket No. 96-98 (FCC filed May 26, 1999)).

[9] Comments of Cox Communications, Inc. at ii, CC Docket No. 96-98 (FCC filed May 26, 1999) (C.A. App. 469).

provide the services it seeks to offer." *UNE Remand Order* ¶ 51 (Pet. App. 73a). The Commission refused to define "materially," however, asserting that, "although it cannot be quantified precisely, [materiality] requires that there be substantive differences between the alternative outside the incumbent LEC's network and the incumbent LEC's network element that, collectively, 'impair' a competitive LEC's ability to provide service." *Id.* In other words, according to the Commission, "impair" means "materially diminish," which in turn means "impair."

This revised "standard" gave the Commission such significant discretion that it concluded that CLECs were impaired even when there was undisputed evidence that they were in fact providing service using alternative facilities. As then-Commissioner (now Chairman) Powell explained, the Commission seemed to believe that "CLECs may be deploying these [facilities] *despite* significant impairment." Statement of Commissioner Michael K. Powell, Dissenting in Part, CC Docket No. 96-98, at 3 (Nov. 3, 1999) ("Powell Partial Dissent") (C.A. App. 279). Indeed, at points in its analysis, the FCC affirmatively dismissed the deployment of alternative facilities as "a needless waste of carrier resources." *UNE Remand Order* ¶ 238 (C.A. App. 126).

By refusing to make (or even to consider) distinctions based on geographic and product market characteristics, the Commission ensured that competitors would be able to obtain UNEs even where facilities had already been deployed by many carriers. *See id.* ¶¶ 53, 120 (Pet. App. 75a, 123a). With the single, overly narrow exception for switching, the FCC insisted on a "national list" of UNEs and rejected the notion that it adopt "bright line" rules for unbundling based on market characteristics (even though that is precisely what it did in the switching context). *Id.* ¶¶ 124, 129 (Pet. App. 126a, 129a).

The FCC also considered cost differences that were guaranteed to work in favor of unbundling without considering the countervailing advantages that CLECs enjoy. Of particular relevance, the FCC considered whether available alterna-

tives would allow a competitor to match the incumbent's "ubiquitous network that provide[s] [it] with economies of scale and the ability to reach all customers in [its] service territor[y]." *Id.* ¶ 98 (Pet. App. 109a). Considering such cost differentials in isolation instead of looking to the actual ability to compete using alternative facilities essentially ensures that unbundling will be mandated because, at the time of entry, no new competitor ever has the size or scale of the existing provider with which it is seeking to compete. And the FCC considered that factor while categorically refusing to consider new entrants' ability to target only the most lucrative customers, as well as other significant advantages that CLECs have. *Id.* ¶ 87 (Pet. App. 101a).

Because the FCC's methodology did not vary materially from its original order, the FCC's UNE list remains nearly identical. The Commission removed only one element — operator services and directory assistance — from its original list. *Id.* ¶¶ 446, 462 (C.A. App. 216-17, 225). The Commission reinstated all its other unbundling rules and even used the remand as an opportunity to expand the list of elements.[10] The FCC thus preserved the ability of competitors to obtain access to complete pre-assembled services at UNE rates, despite this Court's indication that application of a proper unbundling test could well render that issue "largely academic." *Iowa Utils. Bd.*, 525 U.S. at 392.

In the companion *Line Sharing Order*, the FCC also expanded unbundling requirements in a very significant way. Line sharing involves leasing the use of the high-frequency portion of the spectrum carried by the local loop (the wire that connects a customer's premises to the telephone network) to provide high-speed data transmission, including

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[10] The Commission extended the definition of a local loop to include dark fiber (fiber optic cable without the related electronics); added packet switches (which are switches used to provide high-speed data services) in some circumstances, as well as high-capacity loops and loops "conditioned" for high-speed data services; and insisted upon "subloop" unbundling (that is, unbundling of discrete parts of a local loop).

Internet access, using Digital Subscriber Line ("DSL") technology.

DSL is one of at least four high-speed data technologies that compete in the single market for what are known as "advanced" or "broadband" services. The other three major technologies that compete in this market are cable modem, wireless, and satellite, none of which requires access to telephone lines. The FCC has repeatedly concluded that these four technologies compete intermodally in a single market, and that it is cable modem, not DSL, that is far and away the market leader. In a report released months before the *Line Sharing Order*, the FCC determined that the advanced-services market is technologically heterogeneous, "accommodat[ing] different technologies such as DSL, cable modems, utility fiber to the home, satellite and terrestrial radio."[11] "The most popular offering of broadband to residential consumers is via 'cable modems,' offered by cable television companies within their cable service territories."[12]

In the *Line Sharing Order*, however, the FCC failed to reckon with the competitive reality of the broadband market. The FCC did not address its own prior analysis of the advanced-services market, nor did it ever discuss whether it is consistent with the 1996 Act and its pro-competitive policies to require unbundling in a market that is already characterized by significant facilities-based competition. Instead, the FCC mandated line sharing based on an inquiry that looked only at advanced services provided through a single *technology* — copper-loop-based DSL. *See, e.g., Line Sharing Order* ¶ 36 (Pet. App. 267a).

5. The Court of Appeals Proceedings. In a unanimous decision issued in May 2002, the D.C. Circuit granted the

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[11] Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 14 FCC Rcd 2398, 2423, ¶ 48 (1999).

[12] *Id.* at 2426, ¶ 54 (footnote omitted).

petitions for review of both these FCC orders and remanded the matters to the Commission.

The D.C. Circuit recognized the "extraordinary complexity" of the task facing the FCC and made plain that it was reviewing the agency's decisions with that fact "in mind." Pet. App. 10a. While the court of appeals thus granted appropriate deference to the FCC, it nevertheless concluded that the *UNE Remand Order* did not comport with section 251(d)(2), as interpreted by this Court in *Iowa Utilities Board*, and in key respects was not sufficiently explained. The court did not purport to tell the FCC what elements must be unbundled or where it should strike the unbundling balance; instead, it identified issues that the statute, as interpreted by this Court, required the agency to consider in determining appropriate sharing rules, but that the agency had failed adequately to consider on remand.

The court of appeals found "[o]f particular importance" the FCC's refusal to consider evidence concerning specific product and geographic markets. *Id.* at 5a. The FCC repeatedly "chose to adopt a uniform national rule, mandating [an] element's unbundling in every geographic market and customer class, without regard to the state of competitive impairment in any particular market." *Id.* at 10a. "As a result, *UNEs will be available to CLECs in many markets where there is no reasonable basis for thinking that competition is suffering from any impairment* of a sort that might have [been] the object of Congress's concern." *Id.* (emphasis added).

Although the court of appeals canvassed all the potential justifications for this result in the FCC's order, it found none adequate to justify such a requirement. For instance, in expressing concerns about administrative practicality and marketplace certainty, the FCC "simply . . . assum[ed]" that any more tailored rule "would be unpredictable and hard to apply," even though the Commission adopted just such a rule for switching. *Id.* at 13a.

Similarly, the FCC could not rest its adoption of such unnecessarily broad rules on the simple belief that "more unbundling is better." *Id.* at 17a. As the court of appeals

explained, the "impairment" inquiry, as interpreted in *Iowa Utilities Board*, requires a "balance" between the benefits of unbundling true bottleneck facilities in allowing competition in other facilities and the disincentives to investment that forced unbundling creates. *See id.* at 14a-15a, 21a. Given that judgment, the court reasoned that, "to the extent that the Commission orders access to UNEs in circumstances where there is little or no reason to think that its absence will genuinely impair competition that might otherwise occur," the Commission must "point to something a bit more concrete than its belief in the beneficence of the widest unbundling possible." *Id.* at 17a. In this regard, the court noted that *Iowa Utilities Board* did not specify a single "'right'" way for the FCC to go about unbundling, but that its judgment that "'blanket access'" was impermissible indicated that the FCC must conduct a more "nuanced" impairment inquiry than that reflected in its remand decision. *Id.* at 17a-18a.

The court of appeals also faulted the FCC for ignoring this Court's injunction not to look at cost disparities in isolation, but rather at whether competitors are impaired in their ability to provide the services they seek to offer. *See id.* at 18a. The court was troubled by the FCC's focus on economies of scale — which will always favor the incumbent in any industry — without putting that cost difference in the context of whether CLECs could still reasonably supply the element. Such reasoning was contrary to this Court's "disparagement" in *Iowa Utilities Board* of the "Commission's readiness to find '*any*' cost disparity reason enough to order unbundling." *Id.* at 21a.

Finally, the court of appeals invalidated the *Line Sharing Order* because the FCC focused exclusively on a single broadband technology — DSL — and failed to address the fact that the broadband market as a whole was already characterized by "robust competition" and was in fact "domina[ted]" by cable. *Id.* at 23a-24a. The court found "quite unreasonable" the FCC's assertion that this result was required by the statute's reference to the "services" that the competitor "'seeks to offer.'" *Id.* at 24a. The FCC was

accordingly required to consider the entire "competitive context," not just a single technology in isolation. *Id.* at 25a. Because this Court had made plain in *Iowa Utilities Board* that "unbundling is not an unqualified good," the FCC could not simply act with "naked disregard" for the fact that a market is already competitive, and thus that unbundling could well serve no competitive purpose and would in fact "inflict" harm on consumers. *Id.*

The FCC, as well as a number of private intervenors, sought rehearing and/or rehearing en banc, arguing that the court of appeals' decision was inconsistent with this Court's decision in *Verizon*. No D.C. Circuit judge voted for rehearing on that issue, or even requested a response. The court of appeals did, however, grant a partial stay of its mandate as to both FCC orders until January 2, 2003, to allow the FCC to issue a new decision on remand. The FCC, with the consent of all the respondents here, subsequently sought and received an extension of that stay until February 20, 2003.[13]

6. The FCC's *Triennial Review* Proceeding. In December 2001, well before the D.C. Circuit's decision, the FCC issued a Notice of Proposed Rulemaking initiating its *Triennial Review* proceeding.[14] The *Triennial Review* involves a

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[13] Petitioners assert incorrectly (Pet. 14 n.1) that the court of appeals did not vacate both the *UNE Remand Order* and the *Line Sharing Order*. In fact, the court expressly granted the petitions for review as to both FCC orders, and those petitions sought vacatur of both those orders. Moreover, the court of appeals' order granting a limited stay of the mandate expressly applied to both orders. *See* Pet. App. 297a-298a. There would have been no need to issue a stay (and a partial mandate) in the *UNE Remand* case if that order would not be vacated when the mandate issued. Finally, the FCC's motion to extend the stay of the mandate in both the *UNE Remand* and *Line Sharing* cases demonstrates that it understands the court to have vacated both orders, subject to the limited stay. *See* Emergency Consent Motion of the FCC to Extend Partial Stays of Mandates, *United States Telecom Ass'n v. FCC*, Nos. 00-1012, *et al.* (D.C. Cir. filed Dec. 4, 2002) ("Emergency Consent Motion").

[14] Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 16 FCC Rcd 22781 (2001) ("*Triennial Review NPRM*").

"comprehensive evaluation" and "broad review" of the FCC's unbundling rules and, even more generally, its competition policy. *Triennial Review NPRM*, 16 FCC Rcd at 22782, ¶ 1, 22783, ¶ 4. It is intended to take account of changing "market conditions" and to incorporate the significant added experience that the FCC has gained since the 1999 *UNE Remand Order*. *Id.* at 22782-83, ¶¶ 1-3.

As part of this comprehensive review, the FCC has committed to fashioning a "more targeted approach" that, unlike the *UNE Remand Order*, "identifies more precisely the impairment facing requesting carriers." *Id.* at 22783, ¶ 2. In contrast with the *Line Sharing Order*, moreover, the FCC has also vowed to consider intermodal facilities-based competition, particularly in the area of broadband. *See id.* at 22794, ¶ 27 ("The task set out by the statute . . . requires a special focus on questions of intermodal and intramodal competition as they relate to broadband technology."). Additionally, the FCC has made plain that it intends to explore the disincentive effects of overbroad unbundling, the benefits of facilities-based competition, and the relevance of universal-service distortions to unbundling. *See id.* at 22791-94, ¶¶ 22-25, 22796-97, ¶ 32.

The FCC initially committed to resolving these issues by the end of 2002. *See id.* at 22818, ¶ 81. The D.C. Circuit accordingly stayed its mandate originally until January 2, 2003, to give the FCC an opportunity to complete its work before its existing unbundling rules were vacated. As noted above, however, the FCC obtained an extension of the D.C. Circuit stay until February 20, 2003. In seeking that brief extension, the FCC represented to the D.C. Circuit that it will be able to "complete its action" in the *Triennial Review* by that date.[15]

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[15] Emergency Consent Motion at 6.

REASONS FOR DENYING THE PETITION

I. THIS CASE CONCERNS ORDERS THAT WILL SOON BE SUPERSEDED AND THEREFORE LACK CONTINUING IMPORTANCE

a. The decision below concerns orders and rules that the FCC was *already* comprehensively reconsidering and that the FCC now plans to supersede well before this Court could decide this case on the merits — which would be at the end of 2003, at the earliest. Once the FCC completes its actions in the *Triennial Review* proceeding, this case will be effectively moot.

While the imminence of new agency rules would be important in any context, it is particularly important here, where the FCC made clear even *before* the D.C. Circuit's decision that it intended to address many of the same issues that the court of appeals directed the Commission to consider on remand. Thus, before the court of appeals ruled that the FCC must revisit its decision to adopt nationwide unbundling rules that were "detached from any specific markets or market categories" (Pet. App. 18a), the FCC itself had already promised to adopt a "more targeted approach to unbundling" than the Commission had employed in the orders at issue here. *See Triennial Review NPRM*, 16 FCC Rcd at 22783, ¶ 2. The FCC made plain that it was contemplating "applying the unbundling analysis to specific services, and in a manner that takes into account geographic variations in the availability of alternatives to the incumbent's network." *Id.* at 22798, ¶ 36. The FCC acknowledged that a more refined analysis "may more accurately pinpoint the circumstances under which unbundling is necessary to promote the goals [it has] identified." *Id.* at 22800, ¶ 40.

Similarly, *before* the D.C. Circuit required the FCC to consider in its unbundling analysis intermodal forms of broadband competition (including that provided by dominant cable modem providers), the FCC interpreted the 1996 Act to require consideration of the same factors. As the *Triennial Review NPRM* explains, "[t]he task set out by the statute . . . requires a special focus on questions of intermodal and

intramodal competition as they relate to broadband technology." *Id.* at 22794, ¶ 27. Moreover, as discussed above, as part of its "comprehensive" review of unbundling policy (*id.* at 22782, ¶ 1), the FCC intends to review the importance of facilities-based competition, the disincentive effect of overbroad unbundling, and the relevance of universal-service distortions. *See id.* at 22791-94, ¶¶ 22-25, 22796-97, ¶ 32.[16]

These facts are important here because they demonstrate that, far from creating "crippling regulatory uncertainty" (Pet. 16), the D.C. Circuit's decision here largely required the FCC to undertake the same types of unbundling inquiries that the agency had already begun.[17] There is especially little reason for the Court to expend its limited resources reviewing soon-to-be-superseded rules in such a context.

b. Presumably for these and similar reasons, the FCC and the United States decided against filing their own petition for certiorari. As petitioner AT&T has correctly argued in analogous circumstances (*see supra* p. 1), there is no reason for this Court to second-guess that judgment. Petitioners have cited no case — and we are aware of none — in which the Court has agreed, at the behest of private petitioners, to review a judgment invalidating a federal regulation when the government itself refused to seek certiorari.

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[16] The FCC has also sought comment on the role of the states in the unbundling process and the preemptive effect of federal unbundling determinations. *See Triennial Review NPRM*, 16 FCC Rcd at 22816-17, ¶¶ 78-79. Accordingly, the *Triennial Review* decision, not this case, will present the appropriate opportunity to address the preemption issues that petitioners raise. *Compare* Pet. 29.

[17] Petitioners suggest that the Court granted review in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), in similar circumstances. At issue in *Maislin*, however, was an agency policy that had simply been reiterated in several orders, not a policy that the agency was about to revisit comprehensively. The agency's policy, moreover, involved a pure question of law: whether parties are bound by negotiated rates despite the filed-rate doctrine. Here, by contrast, there is no such purely legal question, and the agency is poised to issue an order superseding the determinations that led to the very rules at issue.

The Court has denied review in such circumstances even when the Solicitor General, filing as a respondent, has supported the private petition. In *Verizon*, for example, although the Court granted certiorari as to the questions presented by the Solicitor General, it did not grant certiorari as to other questions that were presented by AT&T and WorldCom but *not* by the Solicitor General.[18] The Court declined review of such issues even though the Solicitor General argued as a respondent that the Court should grant plenary review as to one of those questions,[19] and even though, in contrast to this case, there was no indication that the FCC was on the verge of issuing superseding rules governing the question.

c. Indeed, even petitioners ultimately acknowledge that it is the upcoming *Triennial Review* decision, not this case, that is of surpassing importance to the future implementation of the 1996 Act. They expressly concede that, if the Court were to grant review, it might later be forced, in light of the FCC's upcoming order, to dismiss the case as improvidently granted. *See* Pet. 28.

Nor is there any foundation for petitioners' unsupported supposition (*id.*) that the FCC may delay its *Triennial Review* if certiorari is granted here. In fact, as noted above, the FCC represented to the D.C. Circuit that it would adopt a new decision by February 2003. The FCC doubtless understands that the delay that petitioners envision would undermine its ability to address the current crisis in telecommunications markets — a crisis triggered in some significant measure by overbroad unbundling that has devalued network investments

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[18] Petition for a Writ of Certiorari at 21-24, *AT&T Corp. v. Iowa Utils. Bd.*, No. 00-590 (U.S. filed Oct. 13, 2000); *AT&T Corp. v. Iowa Utils. Bd.*, 531 U.S. 1124 (2001) (No. 00-590).

[19] *See* Brief for the FCC and the United States at 18-20, *Verizon Communications Inc. v. FCC*, Nos. 00-511, 00-555, 00-590 & 00-602 (U.S. filed Nov. 17, 2000) (review of resale holding was "appropriate[]" because it both "threaten[ed] to read resale out of the 1996 Act as an option for entry into local telecommunications markets" and involved an issue of "considerable importance").

and encouraged questionable business models. As FCC Chairman Powell has explained, the agency undertook the *Triennial Review* and related proceedings "in the hope and expectation that [the FCC] would be able to create more sustainable economic and regulatory foundations to create more viable competitive entry," and with the objective of "bring-[ing] some clarity and certainty" to those areas by resolving the proceedings quickly.[20]

II. THE COURT OF APPEALS' APPLICATION OF THIS COURT'S PRECEDENTS IS CORRECT AND DOES NOT MERIT REVIEW

Petitioners' attack on the merits of the D.C. Circuit's decision, which would require the Court to consider case-specific application of basic principles of administrative law, presents no certworthy issue. Their claim of conflict between the D.C. Circuit's decision and two prior decisions of this Court rests on a misapprehension of both this Court's decisions and the D.C. Circuit's decision.

a. Petitioners' claim here does not involve pure issues of statutory interpretation of the sort that the Court has addressed in its previous 1996 Act decisions. This case is thus unlike *Iowa Utilities Board* and *Verizon*, where the Court resolved such purely legal issues as whether the FCC has jurisdiction to promulgate pricing rules under the 1996 Act; whether the statute precludes a pricing rule based on the forward-looking costs of an efficient network; and whether ILECs can be required to combine network elements for their competitors.

This case, by contrast, presents not a novel question of law, but rather the D.C. Circuit's application of principles *already* established by this Court's prior decisions. *See, e.g.*, Pet. App. 17a-18a, 25a. Cases involving the proper application of established legal principles ordinarily do not justify plenary review. Nor is certiorari warranted, as petitioners incorrectly claim (Pet. 21), to address whether the court of appeals gave

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[20] Michael K. Powell, Chairman, FCC, *Panel I of a Hearing of the Senate Commerce, Science, and Transportation Comm.* (July 30, 2002).

sufficient deference to the FCC's understanding of the statutory scheme. That question is governed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the principles of which the court of appeals expressly invoked. *See* Pet. App. 24a-25a. The application of those principles to the specific facts here raises no compelling issue.

Moreover, the D.C. Circuit's decision rests in large part on the court's conclusion that the FCC had not considered relevant factors or sufficiently explained its judgments. *See, e.g., id.* at 11a (the Commission "never explains why the record supports a finding of material impairment"); *id.* at 12a ("the Commission has never explained why such a view makes sense"); *id.* at 13a ("The Commission's order has no explanation of why comparable differentiation was not available for other elements."); *id.* at 17a (the Commission "must point to something a bit more concrete than its belief in the beneficence of the widest unbundling possible"). Thus, even petitioners characterize the D.C. Circuit's decision as largely imposing "explanatory" and "evidentiary" burdens on the FCC. Pet. 18. The case-specific issue of whether, in this instance, the D.C. Circuit correctly applied established case law regarding an agency's duty of reasoned decisionmaking is not an issue warranting merits review by this Court.

b. In any event, petitioners' core assertion that the D.C. Circuit's decision "conflicts . . . with the prior decisions of this Court" (Pet. 16) is demonstrably false.

In fact, the D.C. Circuit's decision follows directly from this Court's precedents. This Court reviewed the FCC's list of unbundled elements in *Iowa Utilities Board*, and there it agreed with the incumbents that the FCC's extraordinarily broad unbundling rules were unlawful. Nevertheless, on remand, the FCC re-established a nearly identical set of rules, and even ordered unbundling in the face of undisputed evidence that new entrants had deployed facilities widely in many markets. Accordingly, in the follow-on decision at issue here, the D.C. Circuit simply invalidated a set of rules

that were nearly identical to the ones vacated by this Court's prior decision. The D.C. Circuit's holding that FCC rules again permitting "unrestricted" UNE access (525 U.S. at 390) were unlawful is thus wholly consistent with — indeed, effectuates — *Iowa Utilities Board*'s holding and its interpretation of section 251(d)(2). And, contrary to petitioners' argument, a D.C. Circuit decision that applies this Court's preexisting interpretation of the relevant 1996 Act provision cannot fairly be said to impose "extra-statutory" burdens. Pet. 18. Moreover, as we demonstrate below, *see infra* pp. 21-25, not only is the D.C. Circuit's ultimate holding consistent with this Court's decision in *Iowa Utilities Board*, but so too are the court of appeals' subsidiary judgments.

Additionally, in *Iowa Utilities Board*, Justice Breyer *concurred* in the analysis reached by all but one other Justice, making "explicit" some points that were "implicit" in the majority opinion. Pet. App. 20a. It is that concurring opinion that the D.C. Circuit cited in its decision. *See id.* Petitioners are simply incorrect in arguing that the D.C. Circuit's analysis "plainly derive[s]" from a dissenting opinion by Justice Breyer. Pet. 20.

Petitioners' last gasp is that the D.C. Circuit's decision conflicts with this Court's decision in *Verizon*. In their view, which they argue at length, *Verizon* establishes that Congress intended to give entrants "'every possible incentive to enter the local retail telephone markets, short of confiscating the incumbents' property,'" and that the availability of UNEs at low TELRIC rates is consistent with facilities investment. *See* Pet. 18-20 (quoting 122 S. Ct. at 1661). But, as those arguments themselves make plain, the issue in *Verizon* concerned the *rates* for facilities that had already been determined to be subject to unbundling, not what facilities should be unbundled in the first place.

Nevertheless, to the extent it is relevant here, *Verizon* supports the D.C. Circuit's conclusion. *Verizon* is firmly grounded in the understanding that the statutory "impairment" standard limits unbundling to elements that are truly not suitable for competitive supply. In the Court's words,

unbundling properly applies to "bottleneck elements," "bottleneck facilities," "facilities that are very expensive to duplicate (say, loop elements)," "expensive facilities," or "some costly-to-duplicate elements." 122 S. Ct. at 1668 & n.20, 1672 & n.27. Indeed, as petitioners themselves note, the Court framed the question before it as whether it is "'better to risk keeping more potential entrants out, or to induce them to compete in less capital-intensive facilities with lessened incentives to build their own *bottleneck* facilities.'" Pet. 21 (quoting 122 S. Ct. at 1672) (emphasis added).

Importantly, moreover, the *Verizon* Court found that low TELRIC rates for UNEs would enhance facilities-based competition precisely because unbundling would be limited to true bottleneck facilities: "[C]ompetition as to 'unshared' elements may, in many cases, only be possible if incumbents simultaneously share with entrants some costly-to-duplicate elements . . . . It is in just this way that the Act allows for an entrant . . . to lease some 'unnecessarily expensive' elements in conjunction with building its own elements . . . . In this case, low prices for the elements to be leased become crucial in inducing the competitor to enter and build." 122 S. Ct. at 1672 n.27; *accord id.* at 1668 n.20.

Just as in this Court's decisions, the D.C. Circuit expressly understood the statute to require a "balance" between what should be unbundled and what should be left to the free market. That balance reflects the conflicting effects of forced sharing — on one hand, "eliminating the need for separate construction of facilities where such construction would be wasteful" and, on the other, the "disincentive to invest in innovation." Pet. App. 20a; *accord id.* at 14a-15a. For all the reasons that we have discussed, that animating principle is consistent with this Court's decisions.

c. The D.C. Circuit's subsidiary determinations are also consistent with — indeed, largely follow from — this Court's analysis of the unbundling standard.

The court of appeals' lead concern was that, by mandating inflexible national unbundling rules, the FCC made UNEs "available to CLECs in many markets where there is no

reasonable basis for thinking that competition is suffering from any impairment." Pet. App. 10a. The court cited evidence, for example, that there were three or more competitive transport providers in 47 of the top 50 metropolitan areas, yet the FCC required ILECs to unbundle transport in all those areas. *Id.* at 11a. The record contained reams more undisputed data about significant competitive deployment, particularly in urban areas. *See* C.A. App. 291-447 (reproducing the detailed *UNE Fact Report* that was part of the agency record). The court's concern was therefore wholly warranted, for the best evidence that CLECs *can* use their own facilities in a market is that they *are* doing so.

The D.C. Circuit's conclusion that the FCC acted unlawfully in this regard follows naturally from *Iowa Utilities Board*. There, the Court specifically ordered the FCC to consider the "availability of elements outside the incumbent's network." 525 U.S. at 389. Any decision as to whether alternatives are "available" must begin with establishing a relevant product and geographic market. It is simply incoherent, and contrary to consistent FCC precedent in analogous areas, to consider such "alternatives" without first defining a market in which the facilities might be offered.[21]

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[21] The FCC has consistently recognized the importance of calibrating its regulations based on market variations. The Commission's order giving incumbents greater pricing flexibility for certain "access services" is based on competitive showings on a market-by-market basis, with bright-line triggers. *See* Fifth Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, 14 FCC Rcd 14221 (1999), *aff'd, WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001). The FCC also defined relevant product and geographic markets in determining whether AT&T remained a dominant carrier. *See, e.g.*, Order, *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271, 3285-92, ¶¶ 19-34 (1995). Similarly, the Commission's merger orders carefully define geographic and product markets to evaluate competitive effects. *See, e.g.*, Memorandum Opinion and Order, *Applications of NYNEX Corp. and Bell Atlantic Corp.*, 12 FCC Rcd 19985, 20014-19, ¶¶ 49-57 (1997).

The D.C. Circuit also properly noted that, in some markets, lack of facilities-based entry reflects not impairment, but rather the decision of state public utility commissions to set retail rates artificially low in order to promote universal service. *Compare* Pet. 21-22. In those areas, the lack of facilities-based entry may well have nothing to do with "impairment" due to the inability to obtain facilities. As the FCC's current Chairman has explained, the "absence" of CLEC facilities deployment in "smaller markets tells us precious little," because "we don't really know whether CLECs have not deployed in those markets because they are impaired or because they just have found it uneconomical to serve those areas, perhaps for reasons unrelated to UNE availability." Powell Partial Dissent at 3 (C.A. App. 279). That analysis is obviously correct, and, contrary to petitioners' claim, it is in no way contrary to this Court's decisions. Indeed, the Court has never addressed the relevance of universal-service distortions to impairment analysis.[22]

The D.C. Circuit also properly adhered to this Court's precedents in faulting the FCC for considering cost advantages — particularly, advantages relating to ubiquity — in isolation and without regard to whether the items could nevertheless be competitively supplied. *See* Pet. App. 18a-21a. As the D.C. Circuit noted, this Court specifically criticized the FCC precisely for looking at cost disparities in isolation and without regard to whether CLECs could nevertheless

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[22] The Court in *Iowa Utilities Board* concluded that it should not read into the statute a *permanent* limitation on access to network elements based on "temporary" universal-service issues. 525 U.S. at 393-94. Here, however, the FCC itself was creating *temporary* rules that it intended to supersede within three years. *See UNE Remand Order* ¶ 151 (Pet. App. 147a-148a). This Court did not hold that, in setting such temporary rules, the FCC should ignore the competitive reality that will exist at the time those rules are in effect.

compete. *See id.* at 21a; *Iowa Utils. Bd.*, 525 U.S. at 389-90 & n.11.[23]

Finally, petitioners badly distort the D.C. Circuit's holding in suggesting that the court vacated the FCC's *Line Sharing Order* because "it was 'unreasonable' for the Commission to 'adher[e] to the letter of the statute.'" Pet. 24 (quoting Pet. App. 24a). In fact, what the court said was that the FCC "respon[ded]" to ILECs' arguments by *claiming* to adhere to the statute, but that the agency's construction of the statute was "quite unreasonable." Pet. App. 24a.

The court was surely correct. Section 251(d)(2) refers to "impairment" in the "services" that a competitor wishes to offer — not in the particular technology that a competitor wishes to use. The broad term "service" is not properly understood to be limited to a single technology, as the FCC itself has recognized in this very context. The FCC has repeatedly explained that the market for "advanced *services*" encompasses not only DSL, but also cable modem, fixed wireless, and satellite offerings that provide the same functionality to consumers.[24] And the Commission has further concluded that cable modem, wireless, and satellite alternatives are all part of that single advanced-services market. *See, e.g.*, *Second Advanced Services Report*, 15 FCC Rcd at 20928, ¶ 28 ("The last mile connection to the end-user [to provide advanced services] can take the form of cable modem service, [DSL] or some other LEC-provided service, terrestrial wireless service, or satellite service.").

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[23] Nor did the D.C. Circuit require adoption of the "essential facilities" test; indeed, it expressly disclaimed such a requirement. *See* Pet. App. 21a.

[24] *See* Second Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 15 FCC Rcd 20913, 20919-20, ¶ 10 (2000) ("*Second Advanced Services Report*") (holding that the market for "advanced services" includes any technology that transmits data at more than 200 kilobits per second).

In the same vein, Congress made plain that "advanced telecommunications capability" was to be understood "without regard to any transmission media or technology." 1996 Act § 706(c)(1), 110 Stat. 153. And it likewise made clear that "telecommunications services" were defined in terms of their functional characteristics "*regardless of the facilities used.*" *See* 47 U.S.C. § 153(43), (46) (emphasis added).

These principles are particularly important here because the broadband market is *already* characterized by intense facilities-based competition, making unbundling unnecessary and counterproductive. As the D.C. Circuit noted, the FCC has repeatedly stated that this broadband market is developing in a competitive manner and that cable modem providers are far and away the market leaders. *See* Pet. App. 23a (collecting repeated FCC findings on these issues). Recognizing the relevance of these facts to its statutory analysis, the FCC has recently explained that "[t]he task set out by the statute . . . requires a special focus on questions of intermodal and intramodal competition as they relate to broadband technology," and that section 251(d)(2) "contains no reference to the types of technology that the Commission must consider in unbundling the network." *Triennial Review NPRM*, 16 FCC Rcd at 22794, ¶¶ 27, 28. Those statements are wholly consistent with the D.C. Circuit's judgment here.

III. THERE IS NO CIRCUIT CONFLICT HERE

Petitioners' fleeting claim of a circuit conflict (Pet. 26) is insubstantial. The one case they cite, *AT&T Communications of Virginia, Inc. v. Bell Atlantic-Virginia, Inc.*, 197 F.3d 663 (4th Cir. 1999), did not involve review of these FCC orders, and the Fourth Circuit did not address the key issues identified in the D.C. Circuit's decision — including the need to target unbundling to product and geographic markets where impairment may exist and the need to consider intermodal competition. Instead, the Fourth Circuit commented briefly about the quantum of effect that may constitute impairment under *Iowa Utilities Board*. *See id.* at 673 (impairment requires "more than a de minimis effect"). That discussion provides no basis to conclude that, on the issues actually

before the D.C. Circuit here, the Fourth Circuit would have reached a result different from that reached below.

Indeed, the Fourth Circuit decision is of such tangential relevance to the questions presented in this case that neither petitioners nor any other party ever cited the case to the D.C. Circuit either on merits briefing or on rehearing.

CONCLUSION

The petition for a writ of certiorari should be denied.

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